

BEFORE THE  
DIVISION OF MEDICAL QUALITY  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

D1-84-404201

In the Matter of the Accusation )  
and the Petition to Revoke )  
Probation Against: )  
JEROME MCCUIN, M.D. )  
Physician and Surgeon )  
Certificate No. C-36270 )  
Respondent )

No. D-4924

OAH No. L-60196

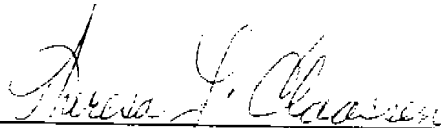
DECISION

The attached Proposed Decision of the Medical Quality Review Committee is hereby adopted by the Division of Medical Quality of the Medical Board of California as its Decision in the above-entitled matter.

This Decision shall become effective on September 17, 1993  
IT IS SO ORDERED August 18, 1993.

DIVISION OF MEDICAL QUALITY  
MEDICAL BOARD OF CALIFORNIA

By



THERESA CLAASSEN  
Secretary/Treasurer

BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DIVISION OF MEDICAL QUALITY  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation	)	No. D-4924
Against:	)	
	)	OAH No. L-60196
JEROME E. MCCUIN, M.D.	)	
20521 Campaign Drive, #24	)	
Carson, CA 90746	)	
	)	
Physician's & Surgeon's	)	
Certificate No. C036270	)	
	)	
Respondent.	)	
_____	)	

PROPOSED DECISION

On July 15, 1993, in Costa Mesa, California, M. Gayle Askren, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Beth Faber Jacobs, Deputy Attorney General, represented the complainant.

Marvin Zinman, Esq., represented respondent.

Evidence was received, the record was closed and the matter was submitted.

FINDINGS OF FACT

I

On October 27, 1992, Kenneth J. Wagstaff (complainant), Executive Director, Medical Board of California (Board), filed a First Amended Accusation and Petition for Revocation of Probation

against Jerome E. McCuin, M.D. (respondent). (Exhibit 31.) Respondent filed a Notice of Defense, and the matter came on for hearing in due course.

## II

The First Amended Accusation and Petition for Revocation of Probation was again amended, upon the motion of complainant at the hearing held herein. Paragraph 29 of that pleading, which had been inadvertently omitted when filed, is as set forth in Exhibit 29, pertinent portions of which were incorporated by reference. A further amendment was made to paragraph 20, at line 4 of page 10 of that pleading. This latter amendment is set forth in the pleading.

## III

Respondent was issued physician and surgeon's certificate No. C 36270 by the Board on December 20, 1974. This certificate is paid and current, with an expiration date of January 31, 1994. (Exhibit 30.) Respondent has been a supervisor of a physician assistant. Respondent's physician assistant supervisor license, No. SA 13322, was issued on December 20, 1974, and expired May 31, 1988. Pursuant to Business and Professions Code section 118, subdivision (b), the Board retains jurisdiction to investigate matters concerning, and to take disciplinary action against, an expired license.

## IV

Previous disciplinary action has been taken by the Board against the certificate set forth in Finding III. On May 29, 1985, an accusation was filed against respondent, Case D-3353, and on February 11, 1987, a decision became effective which provided, in part, that his certificate to practice medicine and

surgery in the state of California was revoked, revocation was stayed, he was placed upon probation for a period of 10 years, and his license was suspended for 120 days. (Exhibit 30.) Accordingly, respondent is subject to the terms and conditions of probation provided in this previous disciplinary order through February 10, 1997.

V

The terms of probation imposed in Case D-3353 included, inter alia, that respondent

- A. Enroll in the Board's diversion program and participate in that program until he has successfully completed the program and is released from it.
- B. Abstain completely from personal use or possession of controlled substances, dangerous drugs, and prescription drugs unless lawfully prescribed for a bona fide illness by another practitioner.
- C. Not prescribe, administer, dispense, order, or possess cocaine.
- D. Obey all federal, state, and local laws, and all rules governing the practice of medicine in California.<sup>1</sup>

VI

On February 18, 1993, in a matter entitled Division of Medical Quality, etc., v. Jerome E. McCuin, M.D., before the

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<sup>1</sup>This provision specifically referred to "any acts committed after the effective date of this decision." (Exhibit 16, paragraph K of Order, Stipulation for Settlement.)

Superior Court of the State of California, County of Kern, Case No. 222811, an order of the court was entered temporarily restraining respondent from practicing medicine, supervising others to practice medicine, and prescribing, dispensing, or administering dangerous drugs or controlled substances. (Exhibit 34.) This order was made pursuant to Business and Professions Code section 125.7, and was based upon Exhibits 1 through and including 30 filed before that court.<sup>2</sup> The Superior Court found that unless a temporary restraining order is granted, serious injury will result to the public, and the public health, safety, or welfare will be endangered before the matter can be heard on notice. The factual issues before the Superior Court are substantially identical to the factual issues before this tribunal. The ruling of the Superior Court is not binding on this tribunal, in that the purpose of section 125.7 is not to conduct a full hearing on the merits of the charges against this respondent; whereas, it is the function of the hearing before the Board to make a full inquiry as set forth in the Administrative Procedure Act provisions relating to administrative adjudication, Government Code sections 11500, et seq. This is acknowledged in the order of the Superior Court, which provided that "pending the administrative hearing and resolution of the Medical Board's First Amended Accusation and Petition to Revoke Probation (No. D-4924) filed against [respondent], and until such time as the Board's decision is subject to judicial review pursuant to [Code of] Civil Procedure Section 1094.5, respondent shall be, and hereby is, immediately restrained and prohibited from: . . . ." (Therein continues the specific prohibitory provisions ordered by the Superior Court.) (Exhibit 34.)

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<sup>2</sup>Identical Exhibits 1 through and including 28 were lodged with this tribunal.

## VII

On June 26, 1987, following a jury trial in the United States District Court, Western District of Washington, in the case of United States v. Jerome E. McCuin, et al., Case No. CR86-202R, respondent was found guilty of committing the following federal crimes regarding a bank fraud scheme:

- A. Violation of 18 USC 371, conspiracy to commit crimes against the United States.
- B. Violation of 18 USC 1343, wire fraud.
- C. Violation of 18 USC 2314, interstate transportation of stolen money.
- D. Violation of 18 USC 2, and 18 USC 1014, false statement to a federally insured bank.
- E. Violation of 18 USC 408(g)(2), misrepresentation of Social Security Number with intent to deceive. (Exhibit 1.)

Complainant has alleged, and this allegation is accepted as true, that the facts giving rise to the foregoing conviction arose in 1984. As the result of the convictions on certain counts, respondent was sentenced to 3 years commitment to the custody of the Attorney General for imprisonment in the federal prison camp at Boron, California. He was committed for a further period of 5 years on another count, execution of which was suspended, and he was placed on 5 years probation to commence upon his release from custody on the conditions that he obey all laws and comply with the rules and regulations of the United States Probation Department. He was also ordered to pay to Home Savings and Loan Association full restitution.

On January 10, 1988, in the federal matter, the court issued its order specifying the amount of restitution at \$1,595,000.00, which was increased to \$1,699,909.00 with the addition of interest for 198 days.

On June 7, 1989, respondent was released from prison. He commenced his 5-year period of probation at that time. As a condition of probation respondent was ordered to refrain from excessive use of alcohol, and ordered not to purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

On September 27, 1989, respondent's probation was modified to include a provision that he participate satisfactorily in a substance abuse program as directed by the federal Probation Department and that he submit to urinalysis at such times as the Probation Department may direct.

#### VIII

Respondent began using cocaine unlawfully in 1983. Eventually he free-based cocaine in amounts up to 3 grams per day, at a cost of \$300.00 to \$400.00. Respondent actively practiced his cocaine addiction during the incidents which led to his indictment and conviction in the federal proceedings, ante. (Declaration of Rousselo; testimony of respondent.)

#### IX

Respondent failed to comply with the terms of his federal probation, in that he continued unlawfully to use cocaine on December 8, 1991 (Exhibit 12); January 30, 1992 (Exhibit 6); and March 12, 1992 (Exhibit 4.). These acts also constitute violations of probation previously ordered by the Board,

specifically that respondent abstain completely from the use of controlled substances, to include cocaine.

X

Respondent's federal probation required that he submit to chemical testing. He failed to appear, although he was lawfully required to do so, for testing on March 13, 1991; March 17, 1991; January 26, 1991; January 28, 1992; and March 21, 1992.

XI

On and after December 8, 1991, in an effort to provide an explanation for his positive cocaine test obtained on December 8, 1991, respondent provided a typed, unsigned document purporting to be from a physician, Dr. Y. S. Yi, indicating that respondent had been treated by the physician on December 6, 1991, for an acute nose bleed, and that electrical cauterization had been done using cocaine, 4 percent, and cetacaine spray as a topical anesthesia. (Exhibit 13.) Dr. Yi did not treat respondent on December 6, 1991, and the document provided by respondent was knowingly false.

XII

On March 12, 1992, in an effort to explain the basis for his positive cocaine test obtained on January 30, 1992, respondent prepared and gave his probation officer a copy of a document appearing to be from a medical chart and purporting to show he was treated by a physician at the Los Angeles County USC Medical Center emergency room on January 28, 1992, with nasal packing for a massive nose bleed, during which a 4 percent cocaine solution was used. The document bore a scribbled, illegible, initial. (Exhibit 5.) Respondent had not been medically treated at that facility on that date, nor was he ever



treated at the facility with cocaine. The document submitted by respondent was knowingly false and fraudulent.

#### XIII

On May 11, 1992, following a federal hearing on respondent's probation violations (Findings IX, X, XI, and XII), in which the court found respondent had admitted his use of cocaine, had failed to report for drug testing, had falsified documents, and had violated the conditions of probation, the court modified the conditions of respondent's probation. The court added conditions requiring respondent to reside in a jail-type or treatment facility for a period of 45 days. Following his release from custody, respondent was ordered to participate in an inpatient facility, to be determined by the court, for treatment of his cocaine abuse. The inpatient program was to last at least 30 days. (Exhibit 10.)

#### XIV

Respondent served the 45-day sentence and, pursuant to the supplemental order modifying conditions of probation (Exhibit 11), was ordered to participate in Rancho L'Abri Residential Treatment Center's program of treatment for his cocaine abuse.

#### XV

The 30-day treatment at Rancho L'Abri, ante, was respondent's eighth treatment or sober living environment experience since 1986. The others:

- A. Coast View Hospital, January 1986, -- 6 weeks.
- B. Care Unit Hospital of Orange, September 15, 1986, -- 10 days.

- C. Care Unit Hospital of Los Angeles, October 4, 1986, -- 1 month.
- D. Conquest Center, Washington State, 1989-1990, -- 10 months.
- E. Exodus Program, Santa Monica, 1992.
- F. Impact Residential Program, Pasadena.
- G. Freedom House, Long Beach, 1992.

## XVI

Following the imposition of discipline by the Board, ante, Findings IV and V, respondent participated in the Physician's Diversion Program, a program under the auspices of the Board.<sup>3</sup> Despite this participation, respondent continued in his addictive use of cocaine. On September 4, 1991, respondent was terminated from the Physician's Diversion Program.

A biological fluid analysis had detected the presence of cocaine in a specimen collected from respondent on March 22, 1991. (Exhibit 19.) On April 18, 1991, respondent had been notified of his suspension from the practice of medicine as of March 25, 1991; said suspension to continue until he met with the

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<sup>3</sup>The previous discipline followed settlement of an accusation which alleged, inter alia, respondent had, in 1983, submitted a false claim for anesthesia services which had not been rendered; in the same year submitted a different false claim which failed to indicate the procedure was for cosmetic purposes; and in 1982 had falsely represented an anesthesia time and falsely described a procedure for which he had provided anesthesia services. Although it was not alleged, and it was not found, respondent had then violated any law respecting controlled substances, it may be inferred the imposition of the diversion condition had a basis in fact.

Diversion Evaluation Committee on May 1, 1991. This suspension, the legality of which is not before this tribunal, was ordered pursuant to execution of the "Physician's Diversion Program Routine Requirements" agreement (Exhibit 18), signed by respondent on December 12, 1989, which indicates his understanding the program manager had the authority to suspend him "if any of the above circumstances occur." The committee determined respondent would be permitted to sign a new agreement if he would spend at least 3 months in a sober living environment. (Exhibit 21.) Respondent signed this agreement June 3, 1991, and thereby indicated his affirmance of a new 5-year period in the program. (Exhibit 22.) On July 16, 1991, the program manager indicated to respondent the committee permitted him to return to work one day per week, but he must have a worksite monitor and must remain at Freedom House. (Exhibit 23; see Finding XV-G.) Subsequently respondent agreed to remain in a sober living environment until his release from that obligation should be approved by the committee. (August 7, 1991; Exhibit 24.)

A biological fluid analysis again detected the presence of cocaine in a specimen collected from respondent on August 5, 1991 (Exhibit 25), and on September 13, 1991, respondent was notified he had been terminated from the program. (First para., this Finding, ante.)

## XVII

Respondent had signed the Physician's Diversion Program Agreement December 12, 1989. It is inferred that respondent, who was ordered into the program February 11, 1987, and yet did not actively sign the participatory agreement until December of 1989, was temporarily excused from compliance with this probationary condition during his federal commitment (June 1987 - June 1989, Finding VII). This fact also indicates the Board or its agents

had knowledge of the federal conviction and the reasons for the commitment of respondent.

#### XVIII

Respondent has not practiced medicine since February 18, 1993, pursuant to the order of the Superior Court, Finding VI, ante.

Respondent was graduated from medical school at Emory University in 1973. He specialized in anesthesiology. He last practiced as a contract physician at Kern Medical Center, Bakersfield.

He became addicted to cocaine in 1983, after the substance was offered to him at a party. His pattern of abuse has lasted until at least 1992.

Presently respondent is working on controlling this addiction, by again participating in a program of recovery. This program includes individual psychotherapy from a certified therapist, a drug aftercare program at Charter Hospital in Bakersfield as a condition of federal probation, regular drug testing and counselling, two to three Narcotics Anonymous and Alcoholics Anonymous meetings weekly, and volunteering his time to Passages, an outpatient drug treatment center in Bakersfield. He is subject to at least five to seven random drug tests monthly as part of federal probation, and no such test has demonstrated a positive result since March 12, 1992.

Respondent is now working as an assistant administrator at Murphy Medical Management Group, Bakersfield. He is responsible for hiring office personnel and for organizing programs offered by the group. An example of such a program is the Child Health and Disability Program. He does not practice

medicine. Respondent's time is donated, and he has been commended for this by the group's administrator. (Exhibit F.)

Before the imposition of the restraining order in February of 1993, respondent had worked for four weeks at Kern Medical Center as an independent contractor in anesthesiology. He had informed the chairman of the department of his being a recovering cocaine abuser, his being monitored frequently, and of his probation. There was no evidence of impairment while respondent worked at Kern Medical Center; he showed good judgment in his work with patients and staff; he was clinically competent; and his patient outcomes were good. He would be rehired if that were possible. (Exhibit G.)

His federal probation is supervised through a local office in Bakersfield. His current probation officer is optimistic respondent's desire to salvage his career and stabilize his life "far outweighs his desire to revert to the use of drugs." (Exhibit A.) His personal therapist writes:

"Prognosis for recovery is very good. Dr. McCuin is taking an active roll in treatment and appears to have completely surrendered to his disease with continuing self-care his recovery should continue." (Exhibit B.)

The chemical dependency therapist assigned to respondent in his aftercare group at Memorial Center indicates he has known respondent since August of 1992, both at that facility and at Charter Hospital. He praises respondent's active and regular participation in group and individual counselling sessions, and indicates "Should Jerome McCuin continue his commitment to the recovery process and participate at current levels, prognosis is good for this patient." (Exhibit C.)

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From August 1, 1991, until January 30, 1992, respondent was engaged in a 6-month refresher course in the Department of Anesthesiology at the University of Southern California. In the view of the Professor and Chairman, respondent "discharged his duties in a diligent manner." He found respondent to have been "conscientious in his patient care, technically competent and his medical judgment is good." Respondent attended "all the academic activities in the department." The professor had "no hesitation" in recommending respondent. (Exhibit D.)

As found, ante, respondent underwent a period of admission at Rancho L'Abri, from July 9 through August 7, 1992. The final diagnoses in that program were "cocaine dependency, in remission," and "organic mental disorder, affective type, improved." (Exhibit E.) His condition at discharge was described in the following manner:

"The patient was medically stable at the time of his discharge. The patient recognizes specific relapse triggers and dysfunctional behaviors . . . which previously undermined his sobriety and is presently demonstrating some understanding of their role in his relapses. He is also applying coping skills necessary to maintain abstinence. The patient also accepts the concept of continued care and has participated in the development of a continuum of care plan."

Following treatment at Rancho L'Abri, which ended in August of 1992, respondent was an outpatient at Charter Hospital, in Long Beach. (Declaration of Gary Rousselo.) He was found to have been sincere and committed to his sobriety. (Exhibits H and

I.) In January of 1993<sup>4</sup> respondent became an outpatient at the Charter Hospital program in Bakersfield. (Ibid.)

Respondent's federal probation expires July of 1994. Respondent continues to be supervised by the federal probation officials. Pursuant to the requirements of that surveillance, respondent is subjected to drug analysis testing eight or nine times monthly. In fact, he is being tested five to seven times each month. It was not established there have been any positive tests since March 12, 1992.

There is no evidence respondent has been sued civilly for medical negligence.

There is no evidence respondent sold or otherwise distributed any controlled substance.

There is no evidence respondent attended to a patient on any occasion when he was under the influence of cocaine or that any patient was ever injured by respondent.

#### DETERMINATION OF ISSUES

##### I

Doubtless, there did occur a federal conviction. Business and Professions Code section 2236. Finding VII. Respondent has not denied the existence of the conviction, nor could he prevail if he did so. A federal conviction such as this one does constitute a ground of discipline. The underlying acts are acts of dishonesty pursuant to Business and Professions Code section 2234, subdivision (e).

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<sup>4</sup>Rousselo declaration contains a clear error, stating January, 1992. (Page 10, line 4.)

At the instant hearing, respondent objected to introduction of the federal conviction on the bases it did not relate to the qualifications, functions, or duties of a physician and surgeon; it indicated nothing concerning the fitness of the respondent to practice medicine; the facts leading to the conviction were too remote in time; and, simply stated, the complainant was engaging in "overkill." These objections were overruled.

It remains to assess the effect, if any, of the federal conviction for conspiracy, wire fraud, interstate transportation of stolen money, false statements to a federally insured bank, and misrepresentation of a Social Security Number with the intent to deceive, upon the present proceedings. In the view of the trier of fact, the federal conviction has limited application to this matter.

The acts which formed the basis for the conviction occurred in 1984. Finding VII. There is no statute of limitations applicable to these proceedings. The lapse of time, by itself, is insufficient to establish the equitable defense of laches. This defense requires both an unreasonable delay from the time the agency learned of the acts which constitute a cause of discipline and prejudice to the respondent. Gates v. Department of Motor Vehicles (1979) 94 Cal.App.3d 921, 925.

Complainant must also prevail on the issue whether the commission of the acts for which respondent was convicted indicate an unfitness to practice medicine and are substantially related to the qualifications, functions, or duties of a physician.

It was not established what the complainant knew or should have known about the federal crimes or conviction at the time of Board imposition of discipline in 1987. No such doubt



exists that complainant knew, or should have known, within a reasonable time after February 1987, that respondent was incarcerated for specific crimes in June of 1987. This knowledge must be inferred by reason of the forbearance of the Board until December of 1989 from causing respondent to enter into the Physician's Diversion Program contract and agreement. Accordingly, complainant waited for over five years, or until October of 1992, to accuse respondent of the dishonest acts evident in his conviction. This is, per se, an unreasonable delay in bringing administrative charges. Furthermore, the acts which led to the federal conviction occurred in 1984, which was three years before resolution of the Board matter in February of 1987 and eight years before filing of the present matter.

Fundamental fairness requires that under the foregoing circumstances the facts underlying the federal conviction, as well as the conviction itself, not be used against respondent. For this reason, no order of discipline will be made against respondent for the federal conviction per se.

However, there is no doubt the order of probation, as modified, which was imposed by the federal tribunal is effective to establish a legally binding standard of conduct for respondent to observe. Disobedience to the lawful order of that court, insofar as the facts proved respondent abused cocaine, falsified documents relating to his positive cocaine tests, and failed to appear as required for such testing, are violations of law relating to the practice of medicine and may furnish grounds of discipline by the Board.

## II

Cause was established to impose discipline against respondent for violation of Business and Professions Code section

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2239, self use of any controlled substance, by reason of Findings XI, XII, and XVI.

### III

Cause was established to revoke probation and to reimpose discipline against respondent for violation of Business and Professions Code section 2239, possession of, failure to abstain from, and self use of any controlled substance, by reason of Findings V, XI, XII, and XVI.

### IV

Cause was established to revoke probation and to reimpose discipline against respondent for violation of law, namely probationary conditions attaching to the federal conviction, by reason of Findings V, VII, IX, X, XI, XII, and XIII.

### V

Cause was established to revoke probation and to reimpose discipline against respondent for violation of the Board's probationary conditions, in failing to obey all laws relating to the practice of medicine, by reason of Findings V, XI and XII.

### VI

Cause was established to impose discipline, to revoke probation and to reimpose discipline against respondent for violation of Business and Professions Code section 2234, subdivision (e), commission of acts involving dishonesty which are substantially related to the qualifications, functions, and duties of a physician, by reason of Findings V, XI and XII.

## VII

Cause was established to revoke probation and to reimpose discipline against respondent for violation of the Board's probationary conditions, in failing to complete successfully the Board's Physician's Diversion Program, by reason of Findings V and XVI.

## VIII

Cause was established to impose discipline, to revoke probation and to reimpose discipline against respondent for violation of Business and Professions Code sections 2262 and 2262, knowingly making documents related to the practice of medicine which falsely represent the existence or nonexistence of a state of facts; and creating any false medical record with fraudulent intent, by reason of Findings V, XI, and XII.

## IX

Respondent's recent sobriety is too short-lived and his treatment history too unsuccessful to rely upon as a demonstration of his ability to practice medicine with safety to the public. (Exhibit 27.)

The most that may be presently stated is that there is no evidence he is out of control. Much more time is needed for him to participate in recovery.

It is somewhat ironic that respondent was not restrained from further practice in December 1991, January 1992, or even March 1992, when his cocaine abuse was apparently uncontrolled. Only after his federal 45-day sentence in mid-1992, followed by signs of improvement as he participated in the program at Rancho L'Abri, followed by further evident successes

at Charter Hospitals in Long Beach and Bakersfield, and at the time of successful job performance at Kern Medical Center, did the complainant seek an injunction against him.

It is not helpful to take evidence from experts who endeavor to predict the success, or lack of it, they expect from one with the record of this respondent. A finding of fact that Dr. McCuin will not succeed in his present effort at lifelong sobriety is not necessary to a determination of this case. Such a finding would certainly furnish him with little solace. Past failures to remain clean and sober do serve to eliminate trust in him by others, such as this licensing agency. But past failures should not diminish the trust he seeks to regain in himself, trust which will possibly be the framework of regaining his license.

#### ORDER

##### I

Physician's and surgeon's license No. C036270, issued to Jerome E. McCuin, M.D., is revoked pursuant to Determination of Issues II, VI, and VIII, separately and severally.

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II

Probation of physician's and surgeon's license No. C036270, issued to Jerome E. McCuin, M.D., is terminated and the order of revocation heretofore made in Case No. D-3353 is hereby reinstated, pursuant to Determination of Issues III, IV, V, VI, and VII, separately and severally.

Date: August 3, 1993



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M. GAYLE ASKREN  
Administrative Law Judge  
Office of Administrative Hearings

1 DANIEL E. LUNGREN, Attorney General  
of the State of California  
2 BETH FABER JACOBS,  
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5 Attorneys for Complainant

6  
7 BEFORE THE  
DIVISION OF MEDICAL QUALITY  
8 MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
9 STATE OF CALIFORNIA

10 In the Matter of the Accusation )  
11 Against: ) Case No. D-4924  
12 Jerome E. McCuin, M.D. )  
20521 Campaign Dr. #24 )  
13 Carson, CA 90746 ) FIRST AMENDED  
ACCUSATION and  
14 California Physician's and ) PETITION FOR  
Surgeon's Certificate ) REVOCATION OF PROBATION  
15 No. C036270 )  
16 Respondent. )

17  
18 Complainant Kenneth J. Wagstaff, as cause for  
19 disciplinary action against the above-named Respondent, charges  
20 and alleges as follows:

21 1. Complainant is the Executive Director of the  
22 Medical Board of California, Department of Consumer Affairs,  
23 State of California ("Board".) He makes and files this  
24 Accusation solely in his official capacity.

25 2. License Status. On or about December 20, 1974,  
26 respondent, Jerome Ellis McCuin, M.D. ("Respondent"), was issued  
27 Physician's and Surgeon's Certificate No. C36270 by the Board,

1 authorizing him to practice medicine in the State of California.

2 An accusation was filed against respondent on May 29,  
3 1985. Thereafter, and pursuant to stipulation, Dr. McCuin's  
4 medical license was revoked, effective February 11, 1987 and the  
5 revocation was stayed; respondent was suspended from the practice  
6 of medicine for 120 days, and placed on ten years probation, with  
7 attendant conditions. Respondent's Certificate is, and has been,  
8 in full force and effect since the term of his suspension expired  
9 in June, 1987.

10 3. Respondent is authorized to supervise Physician  
11 Assistants, under supervisor license number SA 13222.  
12 Respondent's license has been in a delinquent status since  
13 May 1, 1988, for nonpayment of renewal fees.

14 4. Jurisdiction. Section 2220 of California's  
15 Business and Professions Code ("the Code") provides, in pertinent  
16 part, that the Division of Medical Quality may take action  
17 against all persons guilty of violating any of the provisions of  
18 the Medical Practice Act, i.e., Chapter 5 of Division 2 of the  
19 Code.

20 Section 2227 of the Code provides that a licensee whose  
21 matter has been heard by the Division of Medical Quality, by a  
22 medical quality review committee or a panel of such committee, or  
23 by an administrative law judge, or whose default has been  
24 entered, and who is found guilty may: (a) have his or her  
25 certificate revoked upon order of the division; (b) may have his  
26 or her right to practice suspended for a period not to exceed one  
27 year upon order of the division or a committee or panel thereof;

1 (c) may be placed on probation upon order of the division or a  
2 committee or panel thereof; (d) may be publicly reprimanded by  
3 the division or a committee or panel thereof; and/or (e) may have  
4 such other action taken in relation to discipline as the  
5 division, a committee or panel thereof, or an administrative law  
6 judge may deem proper.

7           5. Summary of Statutory Violations. This Accusation  
8 is brought, and respondent is subject to disciplinary action,  
9 pursuant to the following sections of the Medical Practice Act  
10 which describe unprofessional conduct:

11           a. Section 2234(a) -- Violating or attempting to  
12 violate, directly or indirectly, any provision of the  
chapter of the licensing provisions;

13           b. Section 2234(e) -- The commission of any act  
14 involving dishonesty or corruption which is substantially  
15 related to the qualifications, functions, or duties of a  
physician or surgeon;

16           c. Section 2236 -- The conviction of any offense  
17 substantially related to the qualifications, functions, or  
duties of a physician and surgeon;

18           d. Section 2239 -- self use of any controlled  
19 substance or the use of any dangerous drugs specified in  
Section 4211<sup>1/</sup>;

20           e. Section 2261 -- Knowingly making any document  
21 related to the practice of medicine which falsely  
represents the existence or nonexistence of a state of  
facts; and

22           e. Section 2262 -- Creating any false medical record  
23 with fraudulent intent.

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25  
26           1. Pursuant to section 4211, a dangerous drug means any  
27 drug unsafe for self-medication, including any drug which  
requires, under federal or state law, a prescription for lawful  
dispensing.



1 FACTUAL ALLEGATIONS

2 Overview

3 6. Respondent, an anesthesiologist, has subjected his  
4 license to disciplinary action because of his federal  
5 convictions for fraud (including bank fraud, wire fraud, and the  
6 transportation of stolen money), his addiction to cocaine and his  
7 dishonesty in attempting to cover his addiction. In addition,  
8 respondent is also subject to a revocation of the terms of his  
9 probation before the Board because of his continued cocaine use  
10 and termination from the physician's diversion program. The  
11 circumstances subjecting respondent's license to discipline are  
12 as follows:

13 Background Facts: Fraud Scheme and Cocaine Addiction

14 7. In 1984, respondent was involved in a bank fraud  
15 scheme regarding property in Louisiana. Respondent conspired  
16 with others to purchase an eight unit condominium complex in New  
17 Orleans, Louisiana. Based in part on false statements provided  
18 by respondent (including false tax returns) in which he grossly  
19 inflated his net worth, respondent obtained a loan from Home  
20 Savings and Loan Association in the sum of \$2,346,000.00, for the  
21 property, which had been fraudulently overvalued. No payment was  
22 ever made on this principal, although respondent received  
23 kickbacks with those involved in the fraudulent transaction, and  
24 the property was foreclosed upon, showing its actual value to be  
25 approximately \$751,000.00.

26 8. During the 1980's, respondent became addicted to  
27 cocaine. He was abusing the drug during the course of the

1 fraudulent transaction, and continued to abuse the drug on and  
2 off through the years since that time.<sup>2/</sup>

3 Federal Crimes

4 9. On or about June 26, 1987, following a jury trial  
5 in the United States District Court, Western District of  
6 Washington, in the case of United States v. Jerome E. McCuin,  
7 et al., Case No. CR86-202R, respondent was found guilty of  
8 committing the following federal crimes regarding the bank fraud  
9 scheme described above in paragraph 7:

10 a. Violation of 18 USC 371 -- Conspiracy to  
11 commit crimes against the United States (Count X);

12 b. Violation of 18 USC 1343 -- Wire fraud (Count XI);

13 c. Violation of 18 USC 2314 -- Interstate  
14 transportation of stolen money (Count XII);

15 d. Violation of 18 USC 2, and 18 USC 1014 --  
16 False statements to a federally insured bank (Counts  
17 XIII and XIV); and

18 c. Violation of 18 USC 408(g)(2) --  
19 Misrepresentation of Social Security Number with intent  
20 to deceive (Counts XV and XVI).

21 Federal Sentence

22 10. On or about September 25, 1987 respondent was  
23 sentenced for his commission of these crimes, and was ordered to  
24 serve three years in federal prison for his convictions of counts  
25 XIII and XIV (which pertained to his making false statements to a  
26 federally insured bank). He was sentenced to serve two years,  
27 concurrent with the aforementioned sentence, for his convictions  
of counts XI, XII, XV and XVI (pertaining to wire fraud,

2. Cocaine is a Schedule II controlled substance pursuant  
to Health and Safety Code section 11057(b)(6).

1 interstate transportation of stolen money, and the  
2 misrepresentation of his social security number with the intent  
3 to deceive.) Respondent was also sentenced to federal prison for  
4 five years for his conviction of count X (conspiracy against the  
5 United States), which sentence was suspended.

6 In addition, respondent was ordered on probation for  
7 five years following his release from custody, and to pay  
8 restitution to Home Savings and Loan Association in an amount to  
9 be determined. The terms of his probation included the  
10 prohibition that he shall not "purchase, possess, use,  
11 distribute, or administer any narcotic or other controlled  
12 substance, or any paraphernalia related to such substances,  
13 except as prescribed by a physician."

14 11. On or about October 13, 1987, pursuant to an  
15 Amended Judgment and Commitment entered on that date, respondent  
16 was replaced on probation for a period of five years, with terms  
17 and conditions modified from those previously imposed.  
18 Additional requirements were added to require respondent to  
19 participate satisfactorily in a substance abuse program and to  
20 submit to periodic urinalyses by the United States Probation  
21 Office.

22 12. On or about January 19, 1988, the Court's Order was  
23 modified to specify the amount of restitution, which amount was  
24 set at \$1,699,909.00.

25 13. On or about June 7, 1989, respondent was released  
26 from prison and commenced his five year probation period. On or  
27 about September 28, 1989, the terms of respondent's probation

1 were modified at the request of his probation officer. The  
2 following order was added:

3 "The defendant having admitted to a severe cocaine  
4 addiction prior to the time of his imprisonment, and  
5 his probation officer having requested that a special  
6 substance abuse condition be added to the terms of  
7 defendant's probation, and no sufficient cause to the  
8 contrary being shown or appearing to the Court,

9 "IT IS HEREBY ORDERED that the probation  
10 heretofore granted to the defendant is modified to add  
11 the additional, following condition:

12 "That the defendant participate satisfactorily in  
13 a substance abuse program as directed by the Probation  
14 Department and that he submit to urinalysis at such  
15 times as the Probation Department may direct."

16 CONDUCT FOLLOWING IMPRISONMENT

17 Use of Cocaine

18 14. Respondent failed to comply with the terms of  
19 probation. He continued to unlawfully use cocaine, and tested  
20 positively to cocaine on the following dates:

- 21 a. December 8, 1991  
22 b. January 30, 1992  
23 c. March 12, 1992

24 Failure to appear for Drug Testing

25 15. Respondent's federal probation required that he  
26 submit to a chemical test, between four and nine times per month,  
27 depending on the period in question. Respondent failed to comply

1 with the terms of his federal probation by failing to appear for  
2 his scheduled drug testing on the following dates:

- 3 a. March 13, 1991
- 4 b. March 17, 1991
- 5 c. January 26, 1992
- 6 d. January 28, 1992
- 7 e. March 21, 1992

8 Falsification of Documents

9 16. On or after December 8, 1991, in an effort to  
10 provide an explanation for his positive cocaine test obtained on  
11 that date (December 8, 1991), respondent provided a typed,  
12 unsigned document purporting to be from a Dr. Y.S. Li, indicating  
13 that respondent had been treated by the physician on December 6,  
14 1991 for an acute nose bleed, and that electrical cauterization  
15 had been done using cocaine, four percent, and cetacaine spray as  
16 a topical anesthesia.

17 Dr. Yi, however, did not treat respondent on that date.  
18 The purported document was a falsified document prepared by  
19 respondent, or by someone at his direction, to cover his positive  
20 test finding.

21 17. On or about March 12, 1992, in an effort to  
22 explain the basis for his positive cocaine test obtained on  
23 January 30, 1992, respondent prepared and gave his probation  
24 officer a "copy" of a document appearing to be from a medical  
25 chart and purporting to show he was treated by a physician at the  
26 Los Angeles County USC Medical Center emergency room on January  
27 28, 1992, with nasal packing for a massive nose bleed, during

1 which a four percent cocaine solution was used. The document  
2 bore a scribbled, illegible, initial.

3 Respondent, however, had not been medically treated at  
4 the facility on that date, nor was he ever treated at the  
5 facility with cocaine. Respondent, or someone at his direction,  
6 fraudulently prepared the document in order to invalidate his  
7 January 28, 1992 urine test which was positive for cocaine.

8 Sentence for Violation of Probation

9 18. On or about May 11, 1992, following a hearing  
10 respondent's violation of his federal probation, the court new  
11 conditions of probation, in part requiring that:

12 "1. The defendant shall reside in a jail type or  
13 treatment facility for a period of 45 days.

14 2. Following his release from custody, the defendant  
15 shall participate in an in-patient facility, to be  
16 determined by the Court, for treatment of his cocaine  
17 abuse. The duration of this in-patient treatment shall  
18 be for a period of at least 30 days . . . ."

19 19. Respondent served 45 days in jail, and thereafter  
20 was ordered to receive his treatment at Rancho L'Abri, in  
21 Dulzura, California, which he completed. This was respondent's  
22 eighth treatment or sober living environment experience since  
23 1986.<sup>3/</sup>

24  
25 3. Respondent has participated in numerous treatment  
26 programs and sober living environments since 1986, including:  
27 Coast View Hospital, January, 1986 (6 weeks); Care Unit Hospital  
of Orange, September 15, 1986 (ten days); Care Unit Hospital, Los  
Angeles, October 4, 1986 (one month); Conquest Center, Washington  
State, 1989-1990 (ten months); Exodus Program, Santa Monica,  
1992; Impact Residential Program, Pasadena, 1992; Freedom House,

1 VIOLATION OF PROBATION UNDER THE JURISDICTION  
2 OF THE CALIFORNIA MEDICAL BOARD

3           20. An accusation was previously filed by the Medical  
4 Board in 1987, in Case No D-3353, which accusation pertained to  
5 different charges than those referred to, above. The accusation  
6 was based on respondent's conduct occurring between 1982 and 1984,  
7 and, in part, on the allegations that during this period, he  
8 submitted fraudulent insurance billings for anesthesia work he  
9 claimed to have performed, but did not, in fact, perform. By  
10 stipulated Decision, No. D-3353, effective February 11, 1987,  
11 respondent's license was revoked. The revocation was stayed, and  
12 respondent was placed on probation for ten years on certain terms  
13 and conditions. The conditions pertinent to this accusation and  
14 petition to revoke probation are as follows:

15           a. "Within 30 days of the effective date of this  
16 decision, respondent shall enroll in the Board's  
17 diversion program and shall participate in said program  
18 until such time as respondent has successfully  
19 completed and is released from said program."  
20 (Condition A.)

21           b. "Respondent shall abstain completely from the  
22 personal use or possession of controlled substances as  
23 defined in the California Uniform Controlled Substances Act,  
24

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25 of Orange, September 15, 1986 (ten days); Care Unit Hospital, Los  
26 Angeles, October 4, 1986 (one month); Conquest Center, Washington  
27 State, 1989-1990 (ten months); Exodus Program, Santa Monica,  
1992; Impact Residential Program, Pasadena, 1992; Freedom House,  
Long Beach, 1992; and, most recently, Rancho L'Abri, Dulzura,  
July, 1992 (1 month).

1 and dangerous drugs as defined by section 4211 of the  
2 Business and Professions Code, or any drugs requiring a  
3 prescription." (Condition E.)

4 c. "Respondent shall not prescribe, administer,  
5 dispense, order, or possess cocaine." (Condition G.)

6 d. "Respondent shall obey all federal, state, and  
7 local laws, and all rules governing the practice of  
8 medicine." (Condition J.)

9 Termination from Physician's Diversion Program

10 21. Respondent participated in the Physician's  
11 Diversion Program. Despite his participation, respondent  
12 continued in his addictive use of cocaine.

13 22. On or about September 4, 1991, respondent was  
14 unsuccessfully terminated from the Physician's Diversion Program,  
15 for the following reasons:

16 a. "The physician has failed to comply with the  
17 treatment program designed by the Committee.

18 b. "The Committee determines that the applicant has  
19 not substantially benefitted from participation in the  
20 Program or that the applicant's continued participation in  
21 the Program creates too great a risk to the public health,  
22 safety or welfare."

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1 c. Respondent violated his promises to appear for  
2 drug testing when he failed to appear before his  
3 probation officer on five occasions, as alleged in  
4 paragraph 15, above.

5 Conviction of an Offense

6 26. Business and Professions Code section 2236 defines  
7 as unprofessional conduct "[t]he conviction of any offense  
8 substantially related to the qualifications, functions, or duties  
9 of a physician and surgeon . . . ."

10 27. Respondent is also subject to disciplinary action  
11 for unprofessional conduct pursuant to section 2234, subdivision  
12 (a), and section 2236 for his 1987 convictions of numerous  
13 federal offenses, as alleged in paragraph 9, above, and as  
14 follows:

- 15 a. Conspiracy the commit crimes against the  
16 United States,  
17 b. Wire fraud,  
18 c. Interstate transportation of stolen money,  
19 d. False statements to a federally insured bank, and  
20 e. Misrepresentation of a Social Security  
21 Number with intent to deceive.

22 Unlawful Use

23 28. Under Business and Professions Code section 2239,  
24 subdivision (a), "the use or prescribing for, or administering to  
25 himself or herself, of any controlled substance, or the use of  
26 any of the dangerous drugs specified in section 4211" constitutes  
27 unprofessional conduct. . . ."

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1           WHEREFORE, Complainant requests that a hearing be held  
2 on the matters alleged herein, and that following said hearing,  
3 the Board issue a decision:

4           1. Revoking respondent's Physician's and Surgeon's  
5 Certificate No. C-036270;

6           2. Revoking the probation imposed on respondent by the  
7 Board in Decision D-3353;

8           3. Revoking respondent's license to supervise  
9 Physician Assistants, number SA 13222; and

10          4. Taking such other and further action as the Board  
11 deems appropriate and necessary to protect the public  
12 welfare.

13  
14 DATED: October 27, 1992

15  
16 Beth Fisher Jacobs, for  
17 KENNETH J. WAGSTAFF  
18 Executive Director  
19 Medical Board of California  
20 Department of Consumer Affairs  
21 State of California

22 Complainant  
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c:\accusation.1st  
October 27, 1992